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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MARY L. HELMS, *et al.*,

Petitioners,

v.

CECIL J. PICARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF RESPONDENTS GUY MITCHELL, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly applied *Agostini v. Felton*, 521 U.S. 203 (1997), to the specific facts of this case.

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BRIEF OF RESPONDENTS GUY MITCHELL, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case is an as-applied challenge to the administration of a State special education program in a single county, Jefferson Parish, Louisiana. Petitioners contend that certain aspects of the administration of the program, as it operates in eight nonpublic schools, violate the Establishment Clause. The case was tried several years before this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997). The district court held that the operation of the program was unconstitutional under then-current precedents. *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 143a-152a. By the time of the appellate decision, however, this Court had decided *Agostini*, which, as the court below found and all parties agree, presented "a factual situation closely analogous to our own." Pet. App. 18a. The court of appeals carefully considered petitioners' various arguments that features of the Jefferson Parish special education program are unconstitutional under *Agostini*, Pet. App. 5a-42a, but ultimately concluded that the program satisfies constitutional scrutiny under *Agostini*.

Petitioners now ask this Court to review the court of appeals' application of the *Agostini* precedent to the facts of this case. The petition relies heavily on petitioners' characterization of the facts. Because petitioners' characterization is inaccurate in significant respects, and because petitioners' two-sentence summary of the lengthy and careful opinion of the court of appeals is wholly inadequate to illuminate the issues, we set forth an alternative statement of the case in somewhat greater detail than is ordinarily necessary in a brief in opposition.[1]

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[1] Respondents Guy Mitchell, Jan Mitchell, Claire Taylor (Ms. Taylor has recently changed her name, which, in

COUNTERSTATEMENT OF THE CASE

I. THE LOUISIANA SPECIAL EDUCATION PROGRAM

Louisiana law imposes upon public school systems the legal "duty" to provide appropriate special education to "every exceptional child" in the State, including children attending nonpublic schools. La. Rev. Stat. Ann. § 17: 1941 (West Supp. 1998). The category of "exceptional child" is defined by statute to include children with various physical and mental handicaps, as well as gifted and talented children, La. Rev. Stat. Ann. § 17: 1943 (West Supp. 1998), but the program at issue here involves only handicapped children. Eligibility for special education services under this program is determined by public school officials based on statutory criteria. Identical standards of identification, evaluation, and placement are used for public and nonpublic school students. To enable public school districts to fulfill this legal responsibility, State special education funds are allocated among local public school systems on the basis of the number of special education students served by those systems, including students at nonpublic schools. Pet. App. 6a. Public school systems also receive federal money "based on the 'child count' of special education students enrolled at both public and nonpublic schools." Pet. App. 7a. Nonpublic schools themselves have no legal obligation to provide special education services.

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the record below, appears as Claire Friedrichs), Eddie Greer, Colleen Greer, Dennis Thornton, and Darlene Thornton are parents of children attending nonpublic religiously affiliated schools in Jefferson Parish, Louisiana and intervened below to defend the constitutionality of the special education program as well as other programs challenged by petitioners below but not the subject of their petition here.

Local school boards have the option of serving nonpublic school students eligible for special education services either on the premises of public schools or at nonpublic schools. The "mainstreaming" philosophy of special education demands placement in the "least restrictive environment," which the State of Louisiana has determined "is in the school which the child would attend if not exceptional." *See* Ex. S-5, § 448.A.5.[2] Administrators of the Jefferson Parish special education program have accordingly determined that it is appropriate to provide special education services on the premises of nonpublic schools. The record contains substantial evidence regarding the secular pedagogical importance of providing special education on the premises of the student's own school. *See, e.g.*, Janz 4/2/90 Test. 153-56.

Special education services are provided on an individual basis to handicapped children. Those services do not substitute for, or displace, regular classroom instruction. Regular classroom instruction continues while special education students withdraw to receive individualized services in a special education classroom, usually on a one-on-one basis.

The special education needs and curriculum of each eligible child are set forth in an Individualized Education Program ("IEP"). The IEP process is wholly secular, and the IEP contains no religious component or instruction. Pet.

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[2] Citations to stipulated exhibits take the form "Ex. S-_"; citations to defendants' exhibits below take the form "Ex. D-_"; citations to stipulations or other portions of the pretrial order take the form "PTO p. __, No. __"; citations to the trial transcript take the form "[Name] [Date] Test. [Page]." All citations are to materials contained in the record below.

App. 11a. Although petitioners now complain that the nonpublic school principal is a participant in the IEP preparation process, *see* Petition for Writ of Certiorari ("Pet.") 4, 8, 25, at trial petitioners expressly did not challenge the IEP development process or the identity of the educators who participate in its preparation. PTO p. 76, No. 12. In addition, there is no evidence that religious issues or instruction have ever played any part in special education services under this program. Indeed, the district court found that: "[r]eligious instruction is not described in the IEP"; "[n]o church or religious officials have any authority whatsoever over the content of the IEP"; and "[s]pecial education teachers must and do teach only what is outlined in the IEP." Pet. App. 11a, 133a. The district court also specifically found that the "special education teachers at nonpublic schools do not teach religion" and that the "special education classrooms are used only for special education instruction." Pet. App. 11a, citing Pet. App. 134a.

The salaries of Jefferson Parish special education teachers assigned to assist nonpublic school students are paid entirely from the general fund of the Jefferson Parish Public School System ("JPPSS"): Jefferson Parish receives payments from the State to defray a portion of these salary expenditures with the remainder of the total cost of the salaries defrayed through a tuition surcharge paid by the parents of the students served. Pet. App. 9a. The annual cost to the State in 1989-90 for its payments relating to the twelve teachers in this program was approximately $149,583. *Id.* No public funds are disbursed to any public or private school, or to any religiously affiliated organization, under the program. Pet. App. 142a.

The program initially used identical criteria in determining whether special education teachers would be located in any given public or nonpublic school, based on whether the number of students with particular needs economically justified employing a special education teacher

at that location under the State pupil-teacher ratio formula. Adams 4/5/90 Test. 100, 102, 105, 120; Adams 4/6/90 Test. 26-27. In the years just before trial in 1990, because of budget cutbacks and program reductions, the nonpublic portion of the program was curtailed in scope. No new special education positions in nonpublic schools were created, and the original positions were reduced by attrition. Pet. App. 136a. A provision in the collective bargaining agreement between the JPPSS and the teachers' union prohibits involuntary teacher transfers except when changes in teacher-pupil ratios reduce the need for teachers at a particular location. Pet. 10a. At all times, teacher placement decisions have been based entirely on secular criteria.

There is no factual basis for petitioners' assertion that the program has discriminated in favor of Catholic schools, Pet. 18, and petitioners never litigated this question in the court below. Nor is there any factual basis for petitioners' claim that eligible children "enrolled in scores of other [non Catholic] nonpublic schools are deprived" of special education services. Pet. i. Indeed, there is no evidence in the record that *any* student enrolled in any non-Catholic school in Jefferson Parish meeting the student-teacher ratio requirement has sought and been denied the services of an on-premises special education teacher.[3]

In 1989-90, the Jefferson Parish program employed approximately 740 special education teachers to serve over 5,800 handicapped students, a ratio of about 7.9 handicapped students for each special education teacher. PTO p. 71 No. 35. Thirty-five of those teachers, serving 290 handicapped

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[3] The Director of Special Education for Jefferson Parish testified that the reason why no special education teachers were located at some non-Catholic private schools was "because there are not enough students to warrant those classes at the schools." Adams 4/5/90 Test. 100.

students (a ratio of 8.3 handicapped students per special education teacher), were located at eleven nonpublic schools. Twenty-three of those thirty-five teachers were located at private *secular* schools. Twelve special education teachers were assigned to serve students at religiously affiliated schools. *Id.* at 39. Teacher assignments were, and are, made without regard to the religious affiliation of the teacher.[4]

To aid in the discharge of its special education duties, the Jefferson Parish public school district has contracted with a number of nonprofit organizations, including United Cerebral Palsy of New Orleans, Greater New Orleans Association of Retarded Citizens, Jefferson Community Action Program Project Head Start, the Human Development Center of the LSU Medical Center, the Magnolia School, the Hope Haven Center, and the Special Education Services Corporation ("SESC"). *See* Exs. D-13 to D-19. SESC, which is also a respondent herein, is an independent, nonprofit organization. The Jefferson Parish special education program has contracted with SESC to administer special education services at the eight Catholic schools in the parish that have special education teachers under the program, as well as at the Chinchuba Institute for the Deaf, a nonreligious private institution. The board of directors of SESC are predominantly representatives of schools served by the program; the sole employee of SESC, a volunteer Executive Director, is also employed by the Office of Special Education for the Archdiocese of New Orleans. She is not a Catholic, and her past experience was in teaching at a Hebrew Day School. Janz 4/2/90 Test. 76, 78, 105, 134. For purposes of its constitutional analysis, the court below

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[4] Petitioners identify no record support, and respondents are aware of none, for their assertion, Pet. 20, that "[f]or the most part, the special education teachers at the Catholic schools were selected originally by its [sic] principals."

accepted petitioners' characterization of SESC as a religiously affiliated organization. Pet. App. 8a.

Special education teachers under the program are full-time employees of the JPPSS whose employment is governed by the JPPSS collective bargaining agreement. They are required to follow the policies and procedures of the public school system, Pet. App. 134a-135a, and their activities are monitored by the State, which conducts random inspections once every two or three years. Pet. App. 10a. The special education teachers perform routine non-pedagogical tasks within the school, such as lunch duty or bus duty, pursuant to the collective bargaining agreement, Pet. App. 134a, and may be required to attend a monthly faculty meeting not to exceed one hour. *Id.*; *see also* Pet. App. 12a. The agreement between the public school system and SESC specifies that "teacher evaluation in the nonpublic schools falls under the auspices of the Jefferson Parish Public School System." *Id.*; *see also* Pet. App. 12a. As part of that process, public school authorities consider evaluations prepared by the principal of the nonpublic school, which assess the special education teacher's "teaching abilities" and "classroom management skills." *Id.* But, contrary to petitioners' claims that "the sectarian principals' supervision and oversight of the teachers is so broad that, under federal employment principles, the sectarian schools play the role of 'joint employers,'" Pet. 24, the record demonstrates, in the words of the court below, that "the principals' supervisory role is strictly circumscribed" and administrative in nature. Pet. App. 12a. There is "no evidence," the court observed, that "the principals have supervisory authority over the content of the special education program." *Id.*

II. PROCEEDINGS BELOW

Petitioners, who sue in their capacity as taxpayers, originally filed this suit in December 1985, challenging a number of different education programs that extended benefits to nonpublic, as well as public, students in Jefferson Parish.[5] They filed a Second Amended Complaint three years later. Based largely on a record compiled in 1989-90, the district court issued judgment in favor of the petitioners. The court concluded that the most pertinent precedents of this Court were *Meek v. Pittenger*, 421 U.S. 349 (1975), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Pet. App. 149a. Quoting from *Meek*, the court concluded that the special education teachers were "performing educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained," and that, in light of that mission and atmosphere, the "surveillance" that would be necessary to ensure that the special education teachers did not inculcate religion would violate the prohibition on "excessive entanglement." Pet. App. 150a.

The Fifth Circuit reversed. The court began its analysis with an extensive discussion of this Court's intervening precedent, *Agostini v. Felton*, 521 U.S. 203 (1997), which abandoned the presumptions on which the

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[5] Other education programs in Jefferson Parish are the subject of petitions for certiorari filed by different parties. The federal Chapter 2 program is involved in *Mitchell v. Helms*, No. 98-1648 (petition for certiorari filed April 13, 1999), and the State equivalent to Chapter 2 is involved in *Picard v. Helms*, No. 98-1671 (petition for certiorari filed April 13, 1999). Respondents herein are petitioners in No. 98-1648.

district court's conclusion had rested. Pet. App. 18a-27a; *see Agostini*, 521 U.S. at 222-23. The appellate court then noted that this Court had overruled that portion of *Ball* involving the Shared Time program but had not overruled the portion of *Ball* that struck down the Community Education program, and set forth its understanding of the continuing significance of *Ball*. Pet. App. 27a-32a. The court then considered, and rejected, each of petitioners' arguments as to why the Jefferson Parish special education program is unconstitutional under *Agostini* and *Ball*.

Turning first to the issue of government indoctrination (*see Agostini*, 521 U.S. at 223),[6] the court of appeals noted that there is "no evidence whatsoever that any of the special education teachers . . . have ever attempted to indoctrinate their students." Pet. App. 35a. The teachers are "bound by law" to teach only what is included in the student's IEP, and the IEP cannot describe religious instruction. *Id.* "We will not presume that qualified, conscientious state employees are violating the law." *Id.*

The court acknowledged that the "employment status" of these special education teachers "falls somewhere between the Title I instructors in *Agostini* and the Community Education teachers in *Ball*." *Id.* The teachers in this case, unlike those in *Ball*, are "full-time public employees who are not concurrently employed by the parochial schools where they work," and thus "do not suffer from the 'conflict of functions' present in the Community Education teachers in *Ball*." *Id.* On the other hand, the special education teachers here are generally "permanently" assigned to a single school rather than moving from school to school, as in *Agostini*. But, while "admitting that we strike a fine balance," the court of appeals determined that

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[6] It is undisputed that the program has a legitimate secular purpose. *See* Pet. App. 34a.

the absence of the "conflict of functions" present in *Ball* was the more decisive consideration: "The Jefferson Parish teachers are simply not asked to act in the capacity of a 'religious school' teacher during one part of the day, and then to assume the purely secular role of a publicly-financed special education teacher during another." Pet. App. 36a. The court thus held that the public school employee teachers in this case are entitled to the same presumption of compliance with lawful restrictions that was accorded the teachers in *Agostini*. It found no evidence in the record to undercut that presumption. *See* Pet. App. 133a-134a (district court findings that the special education teachers had not, in fact, inculcated religion).

With respect to the fact that the special education teachers are monitored and evaluated by "both public and sectarian entities," the court of appeals noted that the supervision by religious school authorities was largely "administrative" in nature, and that the State "retained sufficient authority over the substantive aspects of the special education instruction" to satisfy the *Agostini* standard. Pet. App. 37a. Similarly, the court found that the "limited 'administrative ties'" of the special education teachers to the religiously affiliated schools, including attendance at faculty meetings and lunch or bus duty, are insufficient to cause a different result. Indeed, the court dubbed it "nonsensical and unsound" to make the constitutionality of such a program "turn on whether state-paid teachers attend faculty meetings or perform lunch duty." Pet. App. 38a, quoting *Agostini*, 521 U.S. at 227-28.

In all other respects, the court of appeals found this case directly analogous to *Agostini*. As in *Agostini*, public funds are "made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefitted." Pet. App. 38a, quoting *Agostini*, 521 U.S. at 225, quoting *Witters* v. *Washington Dept. of Servs.*

for the Blind, 474 U.S. 481, 487 (1986). This is because funds are awarded on the basis of "the number of exceptional students" in each parish, and eligibility for "exceptional" status "depends on entirely secular statutory criteria." *Id.* Whether benefits flow to public or nonpublic school students is determined entirely by the private choices of the exceptional students and their parents. Pet. App. 39a. For much the same reason, the court concluded that "the criteria by which the special education program selects its beneficiaries" create no "'financial incentive to undertake religious indoctrination.'" Pet. App. 41a, quoting *Agostini*, 521 U.S. at 231. "The Louisiana program does not 'define its recipients with reference to religion' and therefore creates no financial incentive to undertake religious instruction." *Id.*, quoting *Agostini*, 521 U.S. at 235.

Similarly, the court of appeals found that the special education program does not relieve the schools of costs they otherwise would have borne, because "only the State, and not the sectarian schools, has the legal duty to 'provide an appropriate, free, publicly supported education to every exceptional child' residing in Louisiana." Pet. App. 39a, quoting La. Rev. Stat. Ann. § 17:1941 (West Supp. 1982). It rejected the district court's argument, repeated by petitioners here, that the nonpublic schools receive a direct economic benefit "in the form of a student's tuition and the surcharge paid by parents to supplement the special education teachers' salaries." Pet. App. 40a, citing Pet. App. 142a. The surcharge, the court explained, is used exclusively to supplement the salaries of special education teachers,[7] and

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[7] State payments account for only a share of the special education teachers' salaries, and the remainder is accounted for by payments made by the local school district (in the case of teachers assigned to public schools) or by the parents of children attending nonpublic schools (in the case of teachers assigned to nonpublic schools). Pet. App. 9a.

does not benefit the schools at all. Pet. App. 40a-41a. Indeed, the court noted that the schools in fact incur additional costs to educate these children, including the cost of provision of a classroom exclusively dedicated to special education. *Id.*

Finally, the court of appeals concluded that the monitoring in place in the Jefferson Parish program is sufficient to prevent or detect any use of the program for religious indoctrination, and that this level of monitoring does not constitute "excessive entanglement" under *Agostini*. Pet. App. 42a. It therefore reversed the district court and rendered judgement declaring the Louisiana special education program "constitutional as applied in Jefferson Parish." Pet. App. 42a.

REASONS FOR DENYING THE PETITION

This case involves nothing more than application of this Court's recent decision in *Agostini* to a slightly different set of facts. Petitioners suggest no reason why it might satisfy the Court's traditional criteria for certiorari review. They do not deny that the court below applied *Agostini* and *Ball* or that those cases establish the appropriate legal standard. They cite no conflict among the lower courts. They make no attempt to claim that the issues they raise concerning the small, vestigial Jefferson Parish program are widespread or recurring, or that the program itself is typical or representative of other state programs. They do not even claim that this case is of particular legal or practical importance. It involves a modest program, operating in a single Louisiana parish, costing less than $150,000, involving only a handful of teachers, which is being gradually phased out through attrition. Pet. App. 136a.

The latter payments are met by charging special education students a tuition surcharge. Pet. App. 40a-41a.

Petitioners do assert that this case "has the necessary record to draw the appropriate parameters for on-premises sectarian school arrangements." Pet. 30. We respectfully suggest that the request for guidance is premature. *Agostini*, which exhaustively re-examined the issues presented by on-premises supplemental education programs, is barely two years old, and educational authorities throughout the nation are currently assessing and developing programs in compliance with its holding. If important and recurring constitutional issues arise, which cannot be resolved by the lower courts, the time may come for this Court to turn its attention again to special education. But it makes little sense for this Court to review the application of *Agostini* to the details of this program, in the absence of any conflict in the circuits.

Moreover, petitioners' attack on the decision below appears to revolve around differences of fact and degree rather than legal principle. The first question presented is based on an argument never litigated in the court of appeals and wholly unsupported by the record. Other issues involve the relative authority of public and nonpublic school officials over these special education teachers and the quantity and adequacy of their monitoring. There is no real disagreement over legal principles, but only about how the facts of *this case* should be evaluated under established constitutional doctrine. It is hard to imagine a less appropriate candidate for certiorari.

Finally, there is no need for this Court's intervention because the decision below is correct in logic and constitutional principle, and entirely consistent with the central theme of this Court's recent decisions in the area of aid to education. In the past twenty years, with the exception of two cases later overruled in whole or substantial part, this Court has upheld *every* neutral program of assistance to

nonpublic and public education. Just two Terms ago, in *Agostini*, this Court overruled prior decisions predicated on the assumption that any teaching by state-employed teachers within the precincts of religious schools entails too great a risk of religious indoctrination, and that the monitoring and surveillance necessary to prevent such indoctrination would constitute excessive entanglement of government with religion. The Court reasoned that when educational assistance is provided on a wholly neutral basis, without regard to religion, and when programmatic safeguards are sufficient to eliminate serious risk of governmental indoctrination, such programs do not violate the Establishment Clause. That reasoning is equally applicable here.

To be sure, the constitutionality of programs providing neutral aid to students in nonpublic and public schools alike, without discrimination, is a matter of great importance. It is difficult to reconcile decisions from the period 1971-79, which invalidated most forms of aid on the theory that any aid to the educational function of nonpublic schools constitutes impermissible advancement of religion, with more recent precedents upholding neutral programs of assistance. This petition for certiorari, however, targets only a slight variation on a subject recently addressed and resolved by this Court, and review of the decision below is completely unnecessary.

I. PETITIONERS' CLAIM THAT THE PROGRAM DISCRIMINATES IN FAVOR OF CATHOLIC SCHOOLS WAS NOT LITIGATED BELOW AND HAS NO SUPPORT IN THE RECORD.

Petitioners lead with the argument that the Jefferson Parish special education program is unconstitutional because it is not "neutral and nondiscriminatory." Pet. 16. The reason, apparently, is that special education teachers are

provided on the premises of only eight "select" Catholic schools. *Id.* at 16-17. Because the nonpublic component of the special education program is being reduced by attrition and gradually phased out, the school district is not increasing on-site special education services at other nonpublic schools. Pet. App. 136a. From this innocuous fact, petitioners infer that the eight Catholic schools "are thus given a competitive advantage over the other nonpublic schools," Pet. 17 n.7, which makes the program "anything but neutral," Pet. 17, and indeed contravenes the constitutional requirement that "one religious denomination cannot be officially preferred over another." Pet. 18, quoting *Larson v. Valente*, 456 U.S. 228, 234 (1982).

This argument involves no legal issue worthy of this Court's attention. Contrary to petitioners' assertions, the court of appeals explicitly held that the Jefferson Parish program extends aid to handicapped students "without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefitted." Pet. App. 38a, quoting *Agostini*, 521 U.S. at 225, quoting *Witters*, 474 U.S. at 487. The court explained that "the Louisiana special education program selects its aid beneficiaries based on neutral, secular criteria: the exceptionality of the child and the number of exceptional students enrolled in Jefferson Parish and in its individual school districts. These are 'neutral, secular criteria that neither favor nor disfavor religion, and [the aid] is [therefore] made available to both religious and secular beneficiaries on a nondiscriminatory basis.'" Pet. App. 41a, quoting *Agostini*, 521 U.S. at 225.

Petitioners say that this factual determination was "erroneous" and that the Fifth Circuit "missed the point." Pet. 16. But even if that were true, it would not justify the use of this Court's resources to correct a mistaken reading of the factual record. *See NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *United States*

v. Johnson, 268 U.S. 220, 227 (1925). Petitioners do not suggest that the *legal standard* applied by the court below was incorrect, or that the decision conflicts with decisions of any other court. Moreover, if the court of appeals failed to appreciate the supposed constitutional significance of the fact that the program now provides on-site services at only eight Catholic schools, that is undoubtedly attributable to the fact that petitioners did not argue in the court of appeals that the Jefferson Parish program is discriminatory or reflects a preference for one religious denomination over another.[8] Having failed to develop the argument in the court below, petitioners should not be permitted to raise it here, without the benefit of the lower courts' views or of factual findings addressing the claim.

In any event, petitioners' charge that the program discriminates in favor of Catholic schools is without support in the record. There is no evidence in the record that students at any nonpublic school otherwise eligible to participate in the program were excluded as a result of pro-Catholic discrimination, and no nonpublic school has raised any such complaint.[9] The only evidence of record bearing

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[8] Combing petitioners' brief in the court of appeals for references even arguably reflecting development of this "discrimination" claim, we can find only a single reference in the summary of argument -- and that reference purports merely to describe the district court's opinion, *see* Reply Brief for Appellants, Responsive Brief for Appellees, and Reply Brief for Cross-Appellees at 13 -- and occasional mention elsewhere of the uncontested fact that the challenged portion of the program operates at eight schools. *Id.* at 20, 29, 34. Petitioners made no further elaboration of the "discrimination" argument in the argument section of their brief and did not develop this argument at trial either.

[9] Petitioners profess to be worried that schools operated by other religious denominations are placed at a

on the "discrimination" issue is the testimony of the Director of Special Education for Jefferson Parish, who explained that the reason why special education teachers were not placed at some non-Catholic private schools was the secular, neutral reason that "there are not enough students to warrant those classes at the schools." Adams 4/5/90 Test. 100.

It is undisputed that eligibility for participation in the program is determined according to a secular criterion ("exceptionality"), and that special education teachers were initially assigned in accordance with student-teacher ratios at particular schools, which is also a secular criterion. In more recent years, the assignment of special education teachers to nonpublic schools has been reduced by attrition (also a secular criterion), in accordance with a provision in the collective bargaining agreement that precludes involuntary transfers (also a secular criterion). There is no evidence that religious affiliation has played the slightest part in these allocation decisions at any time. Indeed, of the 740 special education teachers employed by Jefferson Parish in 1989-90, only thirty-five were assigned to nonpublic schools, and of those, only twelve were assigned to Catholic schools. These facts provide no reasonable basis for an inference of discrimination.

"competitive disadvantage." Pet. 17 n. 7. However, it is doubtful that petitioners, who oppose all forms of aid to nonpublic schools of all religious denominations, and who do not themselves operate or attend a "disadvantaged" school, have standing to defend the interests of non-Catholic nonpublic schools or their students. As taxpayers, they are not injured by the State's failure to extend the program to additional schools. *See Allen v. Wright*, 468 U.S. 757, 751 (1984); *Everson v. Board of Education*, 330 U.S. 1, 4 n.2 (1947); *In re United States Catholic Conference*, 885 F.2d 1020, 1024-26 (2d Cir. 1989).

Petitioners' first question presented is, therefore, quadruply uncertworthy: it reflects a factual, not a legal, disagreement with the court below; it was not raised on a timely basis; it has no support in the record; and it is based on a false factual premise.

II. PETITIONERS' REMAINING CLAIMS PRESENT NO LEGAL ISSUES WARRANTING CERTIORARI.

Petitioners' second question presented is based on the supposed "entanglement" issues in this case, and their third question involves supposed "advancement of religion" issues. Both are predicated on supposed differences between the factual circumstances in this case and those in *Agostini*. Some of those supposed differences are illusory; none is of constitutional dimension; all were thoroughly analyzed by the court of appeals; and none presents a conflict in the circuits or substantial issue of law appropriate for this Court's review.

A. Petitioners' Claim Of Excessive Entanglement

Petitioners assert, Pet. 19, that the Fifth Circuit's entanglement analysis was "relegated . . . to one paragraph only, and is premised on a false concept: If a teacher is 'publicly-paid,' there is no risk that teacher will inculcate religion." But this is a flagrant misrepresentation of the Fifth Circuit's decision. The opinion contains no categorical statement that, if a teacher is publicly-paid, there is no risk that he or she will inculcate religion. Rather, the court stated: "We have not been shown any evidence demonstrating that the monitoring already in place is 'insufficient to prevent or to detect inculcation.'" Pet. App. 42a, quoting *Agostini*, 521 U.S. at 234. In other words, the decision below was based on the *lack of evidence in the record* supporting petitioners' allegations of religious

inculcation -- not on a legal presumption that such a thing could not occur. *See Agostini*, 521 U.S. at 226-27 (Court will not assume, absent evidence of record, that "a full-time public employee . . . will depart from her assigned duties and instructions and embark on religious indoctrination").

The remainder of petitioners' argument in support of certiorari on the second question, Pet. 19-21, consists of supposed factual differences between this case and *Agostini*. The court of appeals addressed these issues in connection with the "governmental indoctrination" question, Pet. App. 35a-39a, and so shall we.

B. Purported Distinctions Between This Case And *Agostini*

As the Fifth Circuit observed, the "factual situation" in this case is "closely analogous" to that in *Agostini*. Pet. App. 18a. As in *Agostini*, full-time public school employees provide entirely secular education services to individual students on the premises of nonpublic schools, on a neutral basis, with institutional safeguards designed to assure that there is no governmental inculcation of religion. Petitioners suggest various grounds for distinguishing *Agostini*. Pet. 22-28. All of these were considered by the court below, and none raises any significant issue of law.

Petitioners' principal arguments are based on supposed differences in the employment status of the special education teachers. Petitioners point out that most of the teachers in this case are permanently assigned to a particular nonpublic school, whereas in *Agostini* "the vast number of the teachers were rotated among the private schools." Pet. 23. Petitioners also argue that nonpublic school officials here have a larger role in evaluating and supervising the special education teachers than was true in *Agostini*. They assert that in this case, unlike *Agostini*, the special education

teachers are "directly accountable to sectarian school principals, and regard them as their immediate supervisors." Pet. 24. Indeed, petitioners claim that the control exercised by the nonpublic school principals is so extensive that the nonpublic schools should be considered "joint employers of the teachers." Pet. 26.[10]

The court below carefully considered petitioners' arguments. The court noted that the "employment status of these special education teachers falls somewhere between the Title I instructors in *Agostini* and the Community Education teachers in *Ball*." Pet. App. 35a. The teachers in the Jefferson Parish program, unlike the teachers in the Community Education program, are full-time employees of the public school district. Accordingly, they "do not suffer from the 'conflict of functions' present in the Community Education teachers in *Ball*." *Id.* On the other hand, as petitioners point out, most of the teachers in the Jefferson Parish program, unlike most of the teachers in *Agostini*, are permanently assigned to perform their duties in a classroom dedicated to secular special education services. Observing that the issue required "fine balance," the court reasoned that

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[10] The legal authorities relied upon by petitioners for this proposition are inapposite. They involve the unrelated questions of when an independent contractor is deemed an employee of a company for purposes of various federal statutes, *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), when referrals placed with an employer by a temporary agency may be counted as "employees" for purposes of triggering statutory coverage under Title VII, *Amarnare v. Merrill Lynch*, 611 F. Supp. 344 (S.D.N.Y. 1984) *aff'd*, 770 F.2d 157 (2d Cir. 1985); *Ryals v. Mobile County Sheriff's Dept.*, 839 F. Supp. 25 (S.D. Ala. 1993), and other similarly unrelated legal issues arising in factual circumstances entirely unlike this one. *See* Pet. 24-26.

the full-time character of the special education teachers eliminates the "conflict of functions" that "spelled doom for the Community Education program in *Ball*." *Id.* The court thus upheld the program.

That resolution of the issue is eminently reasonable. If the mere location of services on the premises of a religious school does not negate the presumption that a public school teacher will obey program requirements, *see Agostini*, 521 U.S. at 227-28, then the duration of that assignment should not lead to the opposite result. Indeed, the Court has already suggested as much in *Agostini* and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).[11] In addition, the district court found as a fact that the teachers in the Jefferson Parish program, even though permanently assigned, are not teaching or inculcating religion. Pet. App. 133a-134a. Petitioners do not dispute that finding, but offer the vague response that permanent assignment "helped solidify a sense that the ostensible public employee was actually a part of the private school faculty." Pet. 23. In fact, the court found that the special education teachers are expressly identified as public employees. Pet. App. 136a. In any event, petitioners' suggestion seems a slender basis for requiring line-drawing about how many teachers spend how much time in what kinds of facilities, which would needlessly complicate resolution of the constitutionality of

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[11] In *Agostini*, Title I teachers at 51 out of the 231 participating nonpublic schools were permanently assigned at those schools. *Felton v. Secretary, U.S. Dep't of Educ.*, 739 F.2d 48, 66 (2d Cir. 1984), *aff'd*, *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled sub nom.*, *Agostini v. Felton*, 521 U.S. 203 (1997). In *Zobrest*, the interpreter was to be permanently assigned to the single school at which the beneficiary student was enrolled. 509 U.S. at 7. This demonstrates that there is no per se rule against permanent assignment.

programs of this sort and lead to the very "uncertainty" and "unnecessary litigation" that petitioners claim they wish to forestall. Pet. 30. In the absence of evidence that permanent assignment to a nonpublic school in fact leads to "governmental indoctrination of religion," there is no need to add this variable to the list of issues.

Petitioners' contentions regarding the supervision and evaluation of the special education teachers reveal nothing more than a disagreement with the lower court regarding characterizations of the facts. Arguably, nonpublic school principals and SESC exercise what the court of appeals called "limited supervision" of the teachers. Pet. App. 37a. But the court concluded, based on its review of the record, that this supervision is primarily "related to administrative matters" and that the State "has retained sufficient authority over the substantive aspects of the special education instructions." Pet. App. 37a. That essentially fact-intensive determination is one of degree, not of legal doctrine, and does not present a certworthy issue of law.[12]

Petitioners also argue that the monitoring in this case is insufficient, Pet. 27-28, that the guidelines given to special

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[12] In the Shared Time program in *Ball*, the teachers were supervised by a principal or other teacher at the nonpublic school to which they were assigned. *Americans United for the Separation of Church and State v. School District of Grand Rapids*, 546 F. Supp. 1071, 1099, *aff'd*, 718 F.2d 1389 (6th Cir. 1983), *aff'd*, *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled sub nom., Agostini v. Felton*, 521 U.S. 203 (1997). Since *Agostini* overturned the decision holding the Shared Time program unconstitutional, it may be inferred that there is no per se rule against any supervisory relations between nonpublic school officials and the public school teachers assigned to work on the premises of their schools.

education teachers to avoid religious indoctrination are insufficient, Pet. 23, and that teacher assignment policies are different from those in *Agostini*, Pet. 21-22. The court of appeals rejected some of these arguments based on the facts in the record. Pet. App. 42a ("We have not been shown any evidence demonstrating that the monitoring already in place is 'insufficient to prevent or to detect inculcation.'"). Others are based on disputed readings of the record, with no factual findings to clarify them. *Compare* PTO, p. 41-42 (Plaintiffs' Statement of Material Facts) *with id.*, p. 62 (Defendants' and Intervenors' Summary of Material Facts); *see also id.*, p. 105 Nos. 170-71 (Contested Issues of Fact) (disputing whether nonpublic schools exercised control over teacher selection). Frequency of monitoring and the character of formal, written guidelines are matters of administrative detail. In no instance do petitioners identify an issue of law that requires this Court's attention.[13] If any of these issues turn out to be of recurring importance they will arise again, and this Court will be able to review an appropriate case with fuller information about the range of policies and the views of the lower courts.

C. Petitioners' Claims Regarding Economic Benefit To The Nonpublic Schools

Petitioners also claim that the special education program "provides economic benefits to religious education." Pet. 29. On this issue, however, the program is

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[13] Petitioners point to one occasion on which a religious symbol was discovered in a special education classroom. Pet. App. 37a n.12. The item was promptly removed. As the court of appeals observed, the "evidence indicates that program monitors would remove such a symbol if they found it in a classroom." *Id.* This single occurrence, quickly corrected, does not create a substantial question of law.

essentially identical to that upheld in *Agostini*. No cash is provided to nonpublic (or public) schools under the program; funds are used entirely for the salaries and activities of public school teachers who provide special education to eligible children. Any incidental benefit to the schools is attributable to private choices. Moreover, since nonpublic schools have no legal obligation to provide special education services to handicapped students, provision of such services by public school teachers does not relieve the schools of any of their legal obligations. *See* Pet. App. 39a. If remedial educational services did not "impermissibly finance religious indoctrination" in *Agostini*, 521 U.S. at 226, the special education services in this case are similarly permissible.

Petitioners argue, however, that three features of the special education program distinguish this case from *Agostini*. First, they point out that "prior to and subsequent to the installation of this program in 8 Catholic schools, other nonpublic schools had established their own special education programs." Pet. 29. That does not distinguish this case from *Agostini*. There was no suggestion in the opinion for the Court that the religious schools involved in *Agostini* had never provided any remedial education services.[14] *See Agostini*, 521 U.S. at 246-47, 251, 253-57 (Souter, J., dissenting) (pointing out the similarity between Title I services and courses already provided by the religious schools). Similarly, the Shared Time program in *Ball*

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[14] Title I, at issue in *Agostini*, required that the funds be used to "supplement, and to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources" for remedial education services. *Aguilar v. Felton*, 473 U.S. 402, 406 n. 6 (1985), *overruled sub nom., Agostini v. Felton*, 521 U.S. 203 (1997), quoting 20 U.S.C. § 3807(b). There was no requirement that the services had to be of a nature or type that the schools did not otherwise provide.

(approved by this Court in *Agostini*) involved courses "indistinguishable from the other courses offered during the regular religious schoolday." *Ball*, 473 U.S. at 388. These holdings belie petitioners' assumption that the government may never provide services of the same type or nature as those already provided by nonpublic schools. All that is even arguably required by this Court's cases is that the government program produce increased benefits for children, as opposed to merely supplanting private efforts. Petitioners do not argue that the special education program fails to provide benefits to the handicapped children attending nonpublic schools. Indeed, they make the damaging admission that "if the services were not provided at the sectarian schools, the special education students would be compelled to attend public schools." Pet. 15. That is true because the high cost of special education puts it beyond the means of most nonpublic schools.

Second, petitioners argue that special education is distinguishable from remedial education because "special education involves the teaching of core subjects." Pet. 29. That, however, is no more true of special education than it was of remedial education. Both forms of education are designed to assist children with unusual problems in obtaining an adequate education. In both contexts, services are provided either one-on-one or in small groups, while teaching continues uninterrupted in the regular classrooms. These special services are not part of the core curriculum, and are not part of the legally prescribed curriculum that is the responsibility of the nonpublic school to impart.

Third, petitioners suggest that the tuition surcharge paid by participating students to defray part of the cost of special education is somehow a benefit to the school. This suggestion is illogical on its face. The schools and their families would be delighted if the government would resume full payment of salaries and expenses for special education

teachers, and eliminate the need for the surcharge. As the court of appeals noted, there is no discernible "'benefit' flowing to the schools from the surcharge; rather, the surcharge represents an economic burden imposed on the parents of parochial school children who wish to secure special education services for their children." Pet. App. 41a.

Petitioners' contrary argument is based on the testimony of a nonpublic school principal, who stated that the $500 surcharge "helps balance out the budget." Pet. 29, quoting Campbell 4/3/90 Test. 22-23. But in the next breath, the principal admitted that he did "not know why there was a surcharge." *Id.* That one principal was unaware of the purpose of the surcharge does not mean that it is an economic benefit to the schools.

In fact, the failure of the local school board to pay the local share of the special education teachers' salaries has the effect of discriminating *against* handicapped children who attend nonpublic schools. Solely because of their exercise of the constitutionally protected right to attend nonpublic schools, these handicapped children are forced to pay $500 per year for special education services other children receive for free. There is no way to twist that disadvantage into a "benefit" to their schools.

The petition thus presents no legal issue warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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